

EXHIBIT 9

1

13:12:40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE, INC.,)
)
Plaintiff,)
) C.A. No. 22-1377 (MN)
v.)
)
MASIMO CORPORATION, et al.,)
)
Defendants.)

Wednesday, December 21, 2022
2:00 p.m.
Teleconference

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: DAVID ELLIS MOORE, ESQ.

-and-

DESMARAIS LLP
BY: JOHN M. DESMARAIS, ESQ.
BY: PETER C. MAGIC, ESQ.

Counsel for the Plaintiff

3

14:00:39 1 client representatives from Apple on the line as well. We
14:00:43 2 have Colette Mayer, Ryan Moran and Natalie Post.
14:00:47 3 THE COURT: All right. Good afternoon to all of
14:00:49 4 you.
14:00:50 5 Let me just start by saying we have reviewed the
14:00:52 6 papers. There was some back and forth in the papers
14:00:55 7 regarding whether or not you all had met and conferred. So
14:01:00 8 I want to start by confirming that you have met and
14:01:03 9 conferred. Plaintiff noted that there was a possible
14:01:06 10 agreement in the works with regard to interrogatories or
14:01:08 11 something of that sort. Where are we currently on this
14:01:12 12 request for discovery?
14:01:13 13 MR. MAGIC: Yes, Your Honor, this is Peter
14:01:17 14 Magic. That's correct, we had tried to work out an
14:01:20 15 agreement about having the defendants answer at least the
14:01:26 16 interrogatory part of what we requested, what Apple has
14:01:30 17 requested. We appear to be reaching an agreement there, but
14:01:35 18 I am not sure that it actually went all the way. I last
14:01:39 19 inquired a few days ago as to whether we would be getting
14:01:44 20 responses before the hearing and I guess I don't have any
14:01:47 21 commitment on that part. So I'll let defendants' counsel
14:01:52 22 speak to that.
14:01:53 23 But I am not sure that we have a firm commitment
14:01:56 24 from them to respond on the interrogatories. But we
14:02:00 25 certainly got close. And perhaps defense counsel will tell

2

1 APPEARANCES CONTINUED:

2
3 PHILLIPS McLAUGHLIN & HALL, P.A.
4 BY: JOHN C. PHILLIPS, JR., ESQ.

5 -and-

6 KNOBBE MARTENS
7 BY: BRIAN HORNE, ESQ.
8 BY: STEVE JENSEN, ESQ.

9 Counsel for the Defendants

10
11 -----

13:52:11

13:59:56 11 THE COURT: Good afternoon, counsel. Who is
13:59:58 12 there, please?
13:59:59 13 MR. MOORE: Good afternoon, Your Honor. On
14:00:01 14 behalf of the plaintiff, Dave Moore from Potter Anderson.
14:00:04 15 And I am joined by my co-counsel from Desmarais LLP, John
14:00:09 16 Desmarais and Peter Magic.
14:00:10 17 THE COURT: Good afternoon.
14:00:12 18 MR. PHILLIPS: Good afternoon, Your Honor. This
14:00:15 19 is Jack Phillips on behalf of the defendant. With me on the
14:00:20 20 phone are Brian Horne and Steve Jensen of the Knobbe firm.
14:00:27 21 THE COURT: All right. Good afternoon to you as
14:00:29 22 well.
14:00:29 23 Anyone else on the line?
14:00:32 24 MR. MAGIC: Yes, Your Honor. Peter Magic from
14:00:36 25 the Desmarais firm. I want to let you know we have three

4

14:02:03 1 me that they are committed to doing so now. But I just
14:02:07 2 don't have that to report to Your Honor at the moment.
14:02:10 3 THE COURT: All right. Let me hear from the
14:02:13 4 defense counsel. Where are we on that?
14:02:15 5 MR. HORNE: Good afternoon, Your Honor. Brian
14:02:17 6 Horne from Knobbe for Masimo.
14:02:20 7 The parties negotiated first the scope of the
14:02:23 8 interrogatories. I think we have reached agreement on the
14:02:26 9 scope. The problem was our proposal was that we would
14:02:30 10 respond to the interrogatories if it would resolve the
14:02:33 11 motion and Apple wouldn't commit to that and wanted to
14:02:36 12 proceed even if they got interrogatory responses, they
14:02:39 13 wanted to proceed to request documents and a deposition. So
14:02:44 14 we will respond to the interrogatories at the appropriate
14:02:47 15 time if we can't resolve this motion.
14:02:49 16 THE COURT: Okay. A couple of other questions I
14:02:57 17 had. For the plaintiff, you argue that there is an urgent
14:03:01 18 need to file your preliminary injunction motion. This case
14:03:04 19 has been pending for over two months and I don't see a
14:03:07 20 motion yet. Are you planning on filing one?
14:03:11 21 MR. MAGIC: Your Honor, yes. Based on
14:03:15 22 everything we know at the time of the expedited discovery
14:03:20 23 motion, there is enough there for us to move if we don't get
14:03:24 24 the discovery. So we know that Masimo's CEO has made
14:03:30 25 certain representations about what his intent is with the

5

14:03:33 1 product that it released and its intent is to capture as
 14:03:37 2 much market share as it can. And it acquired a company for
 14:03:40 3 a billion dollars to try to make good on that. So while we
 14:03:43 4 would certainly prefer to have the discovery first, the
 14:03:51 5 idea, the hope was that we would have discovery first, but
 14:03:55 6 we do have sufficient basis to go forward if we, you know,
 14:04:00 7 can't get that --
 14:04:02 8 THE COURT: Let's say I don't give you the
 14:04:03 9 discovery. When are you planning to file?
 14:04:07 10 MR. MAGIC: I think that the best I could tell
 14:04:10 11 you there is we could proceed in January to file.
 14:04:15 12 THE COURT: Okay. Well, you're the one that's
 14:04:18 13 going to have to convince me that you're being irreparably
 14:04:23 14 harmed and every bit of delay seems like it's working
 14:04:26 15 against you. Does the information you're seeking really
 14:04:30 16 strengthen the motion to such an extent that you need this
 14:04:34 17 discovery?
 14:04:35 18 MR. MAGIC: Well, it certainly could, Your
 14:04:37 19 Honor, that's why we are seeking it. We won't know until we
 14:04:41 20 get it is the basic answer to that question.
 14:04:44 21 THE COURT: All right. Well, it seems to me
 14:04:46 22 that the more prudent course would have been to file a
 14:04:49 23 motion and then to try to get discovery. Lots of courts say
 14:04:53 24 when there is no motion for a preliminary injunction filed
 14:04:57 25 and no hearing pending that expedited discovery isn't

6

14:05:04 1 warranted. Why shouldn't I follow that?
 14:05:06 2 MR. MAGIC: Your Honor, I don't think that there
 14:05:08 3 is any sort of binding authority in that regard as to
 14:05:12 4 whether that's a course of action Your Honor would have to
 14:05:15 5 take.
 14:05:15 6 THE COURT: I didn't ask if I had to take it,
 14:05:18 7 I'm saying why doesn't it make sense? You all think you
 14:05:22 8 have such a great case that you can get a preliminary
 14:05:26 9 injunction. It just seems to me that you're asking for this
 14:05:29 10 discovery, a lot of which seems like it's based on
 14:05:32 11 speculation about someone doing something with your
 14:05:38 12 confidential information, and I don't know, I mean, it just
 14:05:42 13 seems to me that those cases are persuasive, so tell me why
 14:05:48 14 I shouldn't be persuaded.
 14:05:51 15 MR. MAGIC: Sure. Your Honor, let's break it
 14:05:53 16 into the two areas that we're looking at. Right? So there
 14:05:57 17 is two areas of discovery, one of them you just touched on,
 14:06:00 18 the other one is the -- relates to Masimo's distribution
 14:06:05 19 capability to actually distribute the product and market.
 14:06:09 20 So --
 14:06:10 21 THE COURT: It's been two months now. Have they
 14:06:13 22 started distributing it in a way that you're fearful it's
 14:06:17 23 going to bring down Apple's watch business?
 14:06:21 24 MR. MAGIC: No, not presently, Your Honor,
 14:06:24 25 certainly not. But the idea is that a preliminary

7

14:06:29 1 injunction is a tool for looking prospectively. So if we
 14:06:35 2 have the additional information, that could certainly be
 14:06:39 3 relevant, the additional information about Masimo's
 14:06:43 4 distribution capabilities for the product and its plans for
 14:06:46 5 the future in that regard would certainly be relevant to the
 14:06:49 6 prospective potential for irreparable harm. That's why we
 14:06:55 7 seek it. Your Honor is correct, at the moment it doesn't
 14:06:59 8 appear that the product has started to move in significant
 14:07:02 9 numbers.
 14:07:02 10 THE COURT: Let me ask the defendants a couple
 14:07:04 11 of questions. Your briefing didn't focus much on the big
 14:07:07 12 cost factors that I'm supposed to be focused on in looking
 14:07:11 13 at this issue. Why don't you tell me now under that statute
 14:07:14 14 -- why under that standard I should deny the motion.
 14:07:18 15 MR. HORNE: Two things, Your Honor. The good
 14:07:20 16 cause argument on the Jensen discovery was based on some
 14:07:25 17 speculation that Mr. Jensen has done something wrong while
 14:07:30 18 they admit they have no evidence he's done anything wrong.
 14:07:33 19 I think Mr. Magic used the word "could." You mentioned
 14:07:38 20 speculation. We consider this a fishing expedition. Mind
 14:07:42 21 you they've had mountains of discovery --
 14:07:45 22 THE COURT: Go to the distribution channel one.
 14:07:47 23 I understand what you're saying on the one about Mr. Jensen,
 14:07:53 24 you could probably say that in most cases, right, could be
 14:07:56 25 someone did something wrong, so I'm not persuaded on that

8

14:07:59 1 one. Tell me about the distribution channel.
 14:08:02 2 MR. HORNE: In our conference with counsel that
 14:08:04 3 we had after Apple filed its motion, we explained that
 14:08:07 4 Masimo was selling the watch through its website and there
 14:08:12 5 is no imminent plans for a blitzkrieg next week through the
 14:08:17 6 distribution channels that we've acquired.
 14:08:19 7 Their reasoning for the need were twofold. One,
 14:08:26 8 Mr. Kiani's statement in the earnings call that Masimo hopes
 14:08:29 9 or believes their watch should command a hundred percent of
 14:08:33 10 the market. I don't think Apple can say with a straight
 14:08:36 11 face they believe that Masimo is going to conquer a hundred
 14:08:40 12 percent of the smartwatch market next quarter. That's not
 14:08:44 13 what he said, that's not what he meant. I just don't think
 14:08:47 14 Apple believes that. I don't believe they can say that with
 14:08:52 15 a straight face.
 14:08:54 16 THE COURT: What about the burden, what kind of
 14:08:56 17 burden is this? You kind of agreed that you give some
 14:09:00 18 information in interrogatory, I understand that why you
 14:09:03 19 would want to say look, that's all we're going to agree to
 14:09:06 20 give you and if we have to go through the process of going
 14:09:09 21 before the Court, we want to be able to impose everything,
 14:09:12 22 but it doesn't seem in terms of burden that the
 14:09:15 23 interrogatory responses would be too bad because you seem
 14:09:18 24 willing to give those. Is that not right?
 14:09:21 25 MR. HORNE: Yes, Your Honor, that's fine with

9

14:09:23 **1** us. And especially on the distribution interrogatory, I
 14:09:26 **2** think we could get a response to that interrogatory in a few
 14:09:29 **3** weeks, especially given the holidays. And I think that
 14:09:32 **4** should resolve it completely.

14:09:35 **5** THE COURT: All right. And then --

14:09:39 **6** MR. MAGIC: Your Honor, may I be heard?

14:09:41 **7** THE COURT: Yes, go ahead.

14:09:42 **8** MR. MAGIC: Your Honor, I was only going to
 14:09:45 **9** briefly make sure that the facts are out there as to the
 14:09:48 **10** other discovery requests relating to Mr. Jensen. And I just
 14:09:52 **11** don't want it to get lost in the shuffle --

14:09:55 **12** THE COURT: But my problem with that is it
 14:09:57 **13** didn't seem like your requests were narrowed to Mr. Jensen.
 14:10:01 **14** Based on the briefing it seemed like he was the only person
 14:10:03 **15** you were concerned with. But are your requests really
 14:10:07 **16** focused solely on him?

14:10:09 **17** MR. MAGIC: Yes, we're willing to narrow --
 14:10:11 **18** we're willing to make that clearer than it was.

14:10:14 **19** THE COURT: Okay. But you want me to grant a
 14:10:16 **20** motion to give you expedited discovery that you have asked
 14:10:20 **21** for, now you're going and saying wait, we'll take something
 14:10:24 **22** narrower. If you were coming in for expedited discovery,
 14:10:28 **23** shouldn't you have asked for what you actually wanted to
 14:10:31 **24** support with me?

14:10:32 **25** MR. MAGIC: Correct. Yes. And I think our

10

14:10:34 **1** briefing was pretty laser focused on Mr. Jensen and so
 14:10:39 **2** hopefully that was clear enough in terms of how we argued
 14:10:43 **3** the need. But yes, understood, Your Honor. I only wanted
 14:10:47 **4** to make sure that the facts didn't get lost in the shuffle
 14:10:50 **5** that this individual did have access to Apple confidential
 14:10:55 **6** information for a year-and-a-half while the W1 watch that
 14:10:59 **7** was eventually released and has an eerily similar design to
 14:11:04 **8** the Apple watch, while all that was under development,
 14:11:08 **9** Mr. Jensen was on the board of the R & D arm of Masimo, so
 14:11:12 **10** we're not --

14:11:13 **11** THE COURT: But really that's all you have. All
 14:11:15 **12** you have is that someone who had access was on the board.
 14:11:20 **13** Is that what you're telling me? Apple watches are kind of
 14:11:23 **14** out there, aren't they, in the public?

14:11:26 **15** MR. MAGIC: Correct. Yes, the watches are
 14:11:28 **16** certainly out there in the public.

14:11:30 **17** THE COURT: So what is -- tell me something
 14:11:32 **18** other than the fact that he had access and he was on the
 14:11:37 **19** board. Do you have anything else that makes this something
 14:11:42 **20** other than a fishing expedition? There were lots of people
 14:11:46 **21** who had access to confidential information I'm guessing.
 14:11:50 **22** What reason do you have, give me some basis to say maybe
 14:11:53 **23** Mr. Jensen intentionally or unintentionally divulged
 14:12:00 **24** confidential information, what do you have?

14:12:02 **25** MR. MAGIC: Sure. Sure. One, I would say it is

11

14:12:05 **1** unusual for somebody who has confidential information from a
 14:12:08 **2** litigation to serve on the board of a company that's coming
 14:12:11 **3** out with a product that looks like the company that sues for
 14:12:17 **4** the product. In terms of specifics, you know, we did attach
 14:12:21 **5** to Apple's reply brief several of the documents that Apple
 14:12:26 **6** produced in the other litigation that drill into
 14:12:30 **7** confidential information about specific materials that are
 14:12:33 **8** used in that part of the Apple watch, and specific vendors
 14:12:39 **9** that are employed to produce that material, or produce those
 14:12:44 **10** parts. So there is business information there that could be
 14:12:47 **11** relevant to making decisions about whether to make a product
 14:12:50 **12** that comes out and looks similar to the Apple watch. But,
 14:12:57 **13** in fact, it's pretty much a copy of that design, that aspect
 14:13:00 **14** of the Apple watch. So that's what we pointed to. I agree
 14:13:04 **15** Your Honor, that we don't have a smoking gun or anything
 14:13:07 **16** like that, but it seems more than a typical situation.

14:13:10 **17** THE COURT: All right. I have before me
 14:13:13 **18** plaintiff's motion to expedite discovery for information
 14:13:16 **19** relevant to a potential motion for a preliminary injunction.
 14:13:19 **20** A motion that has not been filed. Apple seeks information
 14:13:22 **21** related to one, defendants' distribution channels for the
 14:13:25 **22** sale of the W1; and two, alleged possible misuse of Apple's
 14:13:31 **23** confidential information produced in prior litigation.

14:13:34 **24** Apple argues that the information would be
 14:13:36 **25** relevant to irreparable harm and balance of the equity.

12

14:13:40 **1** Courts in this district have applied a good cause standard
 14:13:44 **2** in accepting requests for expedited discovery. Under the
 14:13:48 **3** standard, I must weigh the need for discovery with the
 14:13:49 **4** breadth of the discovery request and the prejudice to the
 14:13:52 **5** responding parties. Courts consider one, the timing and
 14:13:55 **6** context of the discovery requests; two, the scope and
 14:13:58 **7** purpose of the request; and three, the nature of the burden
 14:14:01 **8** on the respondents.

14:14:02 **9** Plaintiff argues that it showed good cause
 14:14:04 **10** because it has an urgent need to file a preliminary
 14:14:07 **11** injunction motion given that defendants' product was
 14:14:10 **12** introduced to the market this past August, and because the
 14:14:14 **13** requests are narrowly tailored to issues relevant to the
 14:14:20 **14** preliminary injunction and because the burden on defendants
 14:14:23 **15** will be minimal.

14:14:25 **16** I disagree. I find that plaintiff has failed to
 14:14:27 **17** show good cause to expedite discovery at this juncture and
 14:14:31 **18** therefore deny plaintiff's motion.

14:14:34 **19** First, plaintiff has not yet filed a motion for
 14:14:37 **20** preliminary injunction which waives expediting discovery.
 14:14:40 **21** Furthermore, it is not clear that the information requested
 14:14:40 **22** would strengthen plaintiff's potential motion to such an
 14:14:45 **23** extent that expedited discovery is warranted before
 14:14:47 **24** plaintiff has even filed the motion.

14:14:50 **25** Some of the information requested regarding the

13

14:14:52 **1** alleged misuse of confidential information appears to be
 14:14:55 **2** based on mere speculation. In addition, there is a pending
 14:14:58 **3** motion to dismiss requesting that I dismiss found united as
 14:15:02 **4** a defense in this case. I also have concerns that the
 14:15:04 **5** discovery requested is substantially broader than what may
 14:15:08 **6** be relevant. A need for the requested discovery at this
 14:15:11 **7** stage thus does not justify imposing the burden of
 14:15:14 **8** expediting discovery on defendants. So the motion is
 14:15:17 **9** denied.
 14:15:17 **10** That being said, I think that there has been a
 14:15:21 **11** reasonable attempt to get some of the information that the
 14:15:25 **12** plaintiff may need out there in the form of interrogatories,
 14:15:30 **13** and so I guess my question for defendant is can you abide by
 14:15:40 **14** what you had previously agreed to do?
 14:15:45 **15** MR. HORNE: Yes, Your Honor, that agreement was
 14:15:47 **16** on a distribution channel to provide interrogatory response.
 14:15:51 **17** I said a few weeks. I think three weeks would be fair given
 14:15:55 **18** the holidays.
 14:15:56 **19** THE COURT: All right. Then even though I have
 14:15:59 **20** denied the motion, I will order that the defendants produce
 14:16:03 **21** that information, but no other information at this point.
 14:16:08 **22** Anything else that we need to discuss while
 14:16:11 **23** we're on the phone?
 14:16:14 **24** MR. HORNE: No, Your Honor. I just want to be
 14:16:16 **25** clear. Respond to the interrogatory, I thought that was

14

14:16:19 **1** clear on the record, I wanted to make sure.
 14:16:23 **2** THE COURT: Anything else? All right. Thank
 14:16:28 **3** you everyone.
 14:16:28 **4** MR. MAGIC: Nothing from Apple, Your Honor.
 14:16:30 **5** Thank you.
 14:16:31 **6** THE COURT: Enjoy the holidays.
7 (Teleconference concluded at 2:16 p.m.)
8
9 I hereby certify the foregoing is a true and
 accurate transcript from my stenographic notes in the proceeding.
10
11 /s/ Dale C. Hawkins
 Official Court Reporter
12 U.S. District Court
13
14
15
16
17
18
19
20
21
22
23
24
25